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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

CHARLES PEMBROKE,

Defendant and Appellant.

B206480

(Los Angeles County
Super. Ct. No. BA318654)

APPEAL from a judgment of the Superior Court of Los Angeles County,
William C. Ryan, Judge. Affirmed.

Charles Pembroke, in pro. per.; and Linn Davis, under appointment by the Court
of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Charles Pembroke was charged by amended information with one count of gross vehicular manslaughter while intoxicated (Pen. Code, § 191.5, subd. (a), Veh. Code, §§ 3140, 23152 and 23153). After two trials ended in a hung jury, Pembroke waived jury in favor of a bench trial, and submitted the case on the transcripts and exhibits of the earlier trials. Pembroke waived his right to testify at the bench trial.

Summary of People's Trial Evidence

At around 9:30 p.m. on May 26, 2006, Pembroke was driving his car west on Florence Avenue in Los Angeles. He made a left turn onto Harvard Boulevard and collided with a motorcycle ridden by Danny Moton III, who was traveling east on Florence Avenue. Several motorists who had been driving behind Moton testified that he stopped at a red light at Western Avenue and then continued on Florence Avenue at about 35 miles per hour. Moton was still on his motorcycle when it was struck by the front of Pembroke's car. Moton died as a result of the collision. Pembroke was driving with a blood alcohol level of .22/.21.

Los Angeles Police Officer David Sweet testified as an accident investigation expert that Pembroke caused the accident by making an unsafe left turn in violation of Vehicle Code section 21801, subdivision (a).¹ At the scene, Pembroke told police the motorcyclist was traveling at 60 miles per hour and lay down the motorcycle when Pembroke made his left turn onto Harvard Avenue.

Summary of Defense Trial Evidence

The defense evidence consisted primarily of the testimony of Raymond Paladino, an accident reconstructionist. According to Paladino, when Pembroke began turning left at about 15 miles per hour, the motorcycle was about 378 feet away and then traveled on Florence at a high rate of speed. His speed at the time of the collision was about 63 miles

¹ Vehicle Code section 21801, subdivision (a) provides: "The driver of a vehicle intending to turn to the left or to complete a U-turn upon a highway, or to turn left into public or private property, or an alley, shall yield the right-of-way to all vehicles approaching from the opposite direction which are close enough to constitute a hazard at any time during the turning movement, and shall continue to yield the right-of-way to the approaching vehicles until the left turn or U-turn can be made with reasonable safety."

per hour. The point of impact was not the front of the car, but at the right rear wheel. The motorcycle flipped on its side and ejected Moton. Refuting the accounts of prosecution witnesses, Paladino opined there were two causes of the accident: Moton was operating his motorcycle at an excessive rate of speed in violation of Vehicle Code section 23250;² and he failed to yield the right of way to a turning vehicle in violation of Vehicle Code section 21801, subdivision (b).³

Summary of Counsel's Argument

The prosecution argued the cause of the fatal collision was Pembroke's failure to yield the right of way before turning onto Harvard Boulevard. The defense argued the motorcyclist caused the collision by driving at an excessive rate of speed and failing to yield the right of way to a turning car. The defense did not dispute that Pembroke was under the influence at the time, but maintained his driving was not impaired, and he was only guilty of violating Vehicle Code sections 23152, subdivisions (a) and (b).

After reviewing the transcripts and exhibits and listening to argument from counsel, the trial court found Pembroke guilty of the lesser included offense of vehicular manslaughter with ordinary negligence (Pen. Code, § 191.5, subd. (b)). The trial court sentenced Pembroke to the upper term of four years in state prison. Pembroke received presentence custody credit of 932 days (622 actual days, 310 days of conduct credit). The court ordered Pembroke to pay a \$20 security fee and a \$1,000 restitution fine. A parole revocation fine was imposed and suspended pursuant to Penal Code section 1202.45. The court also ordered direct victim restitution totaling \$7,500 under Penal Code section 1202, subdivision (f). This appeal followed.

² Vehicle Code section 23250 provides: "All of the provisions of this code not inconsistent with the provisions of this chapter shall be applicable to vehicular crossings and toll highways. This chapter shall control over any provision of this code inconsistent with this chapter."

³ Vehicle Code section 21801, subdivision (b) provides: "A driver having yielded as prescribed in subdivision (a), and having given a signal when and as required by this code, may turn left or complete a U-turn, and the drivers of vehicles approaching the intersection or the entrance to the property or alley from the opposite direction shall yield the right-of-way to the turning vehicle."

We appointed counsel to represent Pembroke on appeal. After examination of the record, counsel filed an opening brief in which no issues were raised. On July 27, 2009, we advised Pembroke he had 30 days within which to personally submit any contentions or issues he wished us to consider.

On August 25, 2009, Pembroke filed a typed “STATEMENT OF FACTS” for his supplemental brief, in which he first challenges the authenticity of the photographic exhibits admitted into evidence at both trials and considered by the court during the bench trial. On appeal, Pembroke claims, as he did at his bench trial, the photographs of the collision scene had been “deleted and/or changed” by the prosecutor, defense counsel, and police in violation of his constitutional rights under *California v. Trombetta* (1984) 467 U.S. 479 [104 S.Ct. 2528, 81 L.Ed.2d 413] (*Trombetta*). Pembroke asserts these photographs were taken in 2007 and therefore show the collision scene at it appeared then, rather than as it actually was at or near the time of the May 26, 2006 collision. Pembroke’s also contends there are certain documents, which he provided with his supplemental brief, that should have been admitted into evidence in his defense but were not for some reason.

We have examined the entire record, including all of the exhibits, and are satisfied Pembroke’s attorney has fully complied with the responsibilities of counsel and no arguable issues exist. (*Smith v. Robbins* (2000) 528 U.S. 259, 277-284 [120 S.Ct. 746, 145 L.Ed.2d 756]; *People v. Kelly* (2006) 40 Cal.4th 106; *People v. Wende* (1979) 25 Cal.3d 436, 441.) *Trombetta* analyzed loss of evidence cases in the context of examining the illegal destruction of evidence in violation of the Due Process Clause of the Fourteenth Amendment. (*California v. Trombetta, supra*, 467 U.S. at p. 491.) There is no indication the prosecution failed to preserve exculpatory evidence in this case. Nor does the record suggest the photographic evidence was anything other than what it was represented to be. Because Pembroke’s second contention relies upon evidence which is outside the record, it is not cognizable on appeal. (*People v. Seaton* (2001) 26 Cal.4th 598, 634; see *People v. Jones* (2003) 30 Cal.4th 1084, 1105.) To the extent Pembroke is attempting to show ineffective assistance of trial counsel, he is relegated to habeas corpus

proceedings at which evidence outside the appellate record may be taken to determine the basis, if any, for defense counsel's conduct or omission. (See *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.)

The judgment is affirmed.

ZELON, J.

We concur:

WOODS, Acting P. J.

JACKSON, J.